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April 16, 2001

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VIA COURIER

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Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket No. 98-10, 1998 Biennial Regulatory Review —  
Review of Computer III and ONA Safeguards and Requirements

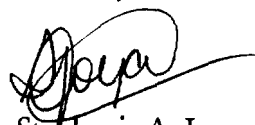
Dear Ms. Salas:

Enclosed for filing please find an original plus four (4) copies of the comments of the United States Internet Service Providers Alliance ("USISPA") in the above-captioned docket.

Also enclosed is a copy of the comments marked "Stamp In." Kindly stamp this document and return it to me in the self-addressed envelope enclosed.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

  
Stephanie A. Joyce  
Associate

Enclosures

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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APR 16 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Computer III Further Remand Proceedings:  
Bell Operating Company Provision of  
Advanced Services

1998 Biennial Regulatory Review —  
Review of Computer III and ONA  
Safeguards and Requirements

CC Docket No. 95-20

CC Docket No. 98-10

COMMENTS OF THE  
UNITED STATES INTERNET SERVICE PROVIDERS ALLIANCE

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Dated: April 16, 2001

## SUMMARY

Access to the local network — the cornerstone of competition in Internet access services — is neither offered by nor effectively required of its stewards, the incumbent local exchange carriers (“ILECs”). Neither the Commission’s *Computer III* open access rules nor Congress’s unbundling mandates in the 1996 Act have given ILEC competitors, CLECs or ISPs, nondiscriminatory access to the crucial local elements upon which they depend to serve customers. The Commission would therefore be ill served to believe that merely extending or reaffirming its ONA/CEI rules will make any significant difference in the ILECs’ anticompetitive treatment of ISPs and other enhanced service providers.

As the storied history of *Computer III* makes clear, the ONA/CEI regimes included several structural flaws and perverse incentives that gave incumbents great advantage in providing new enhanced services. As a general matter, the continuous litigation and rule amendments in *Computer III* left the industry puzzling over whether and how to comply with ONA/CEI. To a large extent, the confusion could only be resolved by the Commission’s grant of rule waivers, which had the effect of permitting the BOCs to provide enhanced services without disturbance. In the end, ONA/CEI operated as little better than a resale scheme.

The 1996 Act has not ameliorated the problems of *Computer III* as the industry had hoped. Section 251 simply introduced another set of competitors that would face the same ILEC intransigence that helped to cause the impending demise of the CLEC industry. Although it provided a far more clear set of obligations and procedures for network unbundling, Section 251 had its own spate of litigation that caused both delay and market uncertainty in the competitive arena. More importantly, Section 251 lacked clear measures for enforcement that would have inhibited ILECs from circumventing the Commission’s rules to the extent that they did.

The Commission should therefore re-examine its competitive efforts in light of its experience under both regimes and establish a new competitive framework to govern ILEC-ISP relations. Though neither *Computer III* nor the 1996 Act achieved their goals, each regime provides useful tools for this endeavor. Using these tools, and by adhering to the competitive principles that it has developed over the course of its unbundling proceedings, the Commission should adopt a new regulatory system for providing competitors with crucial network components.

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Federal Communications Commission  
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	)	
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Advanced Services	)	
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Review of Computer III and ONA	)	
Safeguards and Requirements	)	

**COMMENTS OF THE UNITED STATES INTERNET SERVICE PROVIDERS ALLIANCE**

The United States Internet Service Providers Alliance (“USISPA”), through its undersigned counsel, hereby provides comments on the request by the Commission<sup>1</sup> to refresh the record in the above-captioned proceeding on review of *Computer III* rules.<sup>2</sup> Having witnessed the failure of *Computer III* rules and the Telecommunications Act of 1996<sup>3</sup> (“1996 Act”) to achieve an open local telecommunications network, USISPA recommends that the Commission establish a new competitive framework governing relations between ILECs and ISPs by recrafting its unbundling regime to ensure that both ISPs and CLECs have meaningful, nondiscriminatory access to network facilities.

**INTRODUCTION**

USISPA <[www.usispa.org](http://www.usispa.org)> is a nationwide grassroots association of more than 800 independent ISPs, sponsored by the Commercial Internet eXchange (“CIX”), which comprises one of the nation’s largest groups of telecommunications end users and Internet access suppliers.

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<sup>1</sup> Public Notice, “Further Comment Requested To Update and Refresh Record on Computer III Requirements,” CC Docket Nos. 95-20, 98-10 (rel. Mar. 7, 2001) (“Public Notice”).

<sup>2</sup> *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 30, 1998) (“*Computer III FNPRM*”).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq.* (West 1997).

USISPA was formed to advocate for the creation and fostering of a robust and competitive Internet for all consumers. As part of this mission, USISPA works to ensure that the incumbent local exchange carriers (“ILECs”) open their local networks to competitive LECs (“CLECs”) in a commercially meaningful way, especially with respect to those facilities, such as xDSL-related facilities, that provide American consumers with access to the Internet. Development of a competitive market in Internet access is crucial to this nation’s goal of empowering consumers to attain a higher quality of education, information, entertainment and health services through the Internet.

USISPA submits these comments to illustrate in broad strokes the debilitating effect that the ILECs’ continued control of the local network has caused. The members of USISPA are uniquely positioned to provide this perspective, having worked “in the trenches” of local network provisioning since 1995. Their story mirrors their industry’s experience with *Computer III* and the disappointing lack of success that the 1996 Act brought in ensuring nondiscriminatory ILEC provisioning of network facilities.

I. NEITHER *COMPUTER III* NOR THE 1996 ACT HAS REMOVED THE LOCAL NETWORK BOTTLENECK

The Public Notice seeks comment on whether to continue to impose Comparably Efficient Interconnection (“CEI”) and Open Network Architecture (“ONA”) rules on the ILECs.<sup>4</sup> Specifically, the Commission requests comment on the relative success of these rules as a means of establishing competition in the local network.

In sum, the ONA/CEI rules were of little help in ushering in competition. Clouded with uncertainty due to the many appeals and subsequent revisions that it faced, ONA/CEI was an unwieldy mechanism for enhanced service providers to obtain access to network components. In fact, the *Computer III* regime was a failure. Section 251 of the 1996 Act, which the Commission had

hoped would encourage CLEC market entry to the benefit of both consumers and ISPs,<sup>5</sup> has not served to open the local network much further. Indeed, despite these twin sets of unbundling obligations extending well more than a decade, the ILECs remain sovereign despots over the local network, and especially the crucial last mile loop. As a result, ISPs and the CLECs on whom they often rely face the most dire market circumstances since passage of the 1996 Act.

A. The Commission's ONA/CEI Rules Have Not Provided a Stable Framework for Providing Network Components to ISPs

Implementation of the Commission's *Computer III* ONA/CEI rules was so marred by appeals, waivers and uncertainty that they have had little effect in opening the local network. The rules suffer fundamental difficulties that may be examined in four categories: (1) lack of finality; (2) lack of uniform implementation; (3) structural incentives for incumbents to gate innovation; and (4) discriminatory provisioning mechanisms.

1. The constant litigation and amendment of *Computer III* caused uncertainty and lack of finality that has prevented meaningful implementation of unbundling.

From their inception in 1986 until their last remand in 1995, the delicate interplay between the Commission's structural and non-structural competitive safeguards was in constant flux.<sup>6</sup> What began as an absolute requirement that BOCs providing enhanced services must open their networks to competing carriers and ESPs<sup>7</sup> became a contingency plan that could be avoided by the BOCs' compliance with reporting requirements and network disclosure rules.<sup>8</sup> The BOCs thus became able

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<sup>4</sup> *Computer III FNPRM* ¶¶ 65, 85.

<sup>5</sup> *Computer III FNPRM* ¶ 51.

<sup>6</sup> See *Computer III FNPRM* n.1.

<sup>7</sup> *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, Order and Notice of Proposed Rulemaking, 6 FCC Rcd. 174, 175 (1990).

<sup>8</sup> *Computer III Remand Proceedings*, Order, 5 FCC Rcd. 7571, 7600 (1991).



to introduce new enhanced services to the market on an integrated basis without first obtaining Commission approval.<sup>9</sup>

This deterioration in the ONA/CEI rules caused the Ninth Circuit to vacate and remand the rules to the Commission for the third time.<sup>10</sup> The court's vacating of *Computer III* forced the Commission immediately to reimpose ONA/CEI rules on carriers that had been offering services under the relaxed reporting regime.<sup>11</sup> Having been thus caught with its regulatory pants down, so to speak, the Commission granted blanket waivers to each BOC, permitting them to continue to provide enhanced services on an integrated basis pending their subsequent filing of CEI plans for those services.<sup>12</sup> The barrage of retroactive CEI plans that followed the waivers were approved quickly and without request for amendment.<sup>13</sup> Several more waivers were granted on other grounds.<sup>14</sup>

Passage of the 1996 Act added to the confusion already systemic in *Computer III* implementation. Several carriers withdrew CEI plans that had already been approved.<sup>15</sup> For the carriers that continued to file CEI plans, review of the plans was complicated by uncertainty as to the role that the 1996 Act should play in the approval process.<sup>16</sup> This unfortunate intersection in unbundling law occurred just as the Internet was becoming a national commercial presence and

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<sup>9</sup> See *Bell Operating Companies Joint Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd. 1724, 1728, *recon. denied*, 10 FCC 13,758 (1995) ("*Interim Waiver Order*").

<sup>10</sup> *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*).

<sup>11</sup> "BOCs have not filed CEI plans for several years." *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Video Dialtone-Related Enhanced Services*, Order, DA 95-1283 ¶ 3 (rel. June 9, 1995) ("*Bell Atlantic Video Dialtone Order*").

<sup>12</sup> *Interim Waiver Order*, 10 FCC Rcd. at 1729.

<sup>13</sup> *Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd. 13,758, 13,768-769 (1995).

<sup>14</sup> For example, US West, BellSouth, SWBT and Ameritech received waivers to provide reverse-search capability for electronic white pages without filing CEI plans. *US West Communications, Inc. Petition for Computer III Waiver*, CC Docket No. 90-623 (rel. July 3, 1996); *Ameritech Petition for Waiver of Computer III Rules for Reverse Search Capability*, CC Docket Nos. 85-229 *et al.* (rel. Mar. 24, 1997).

<sup>15</sup> E.g., Public Notice, *Pacific Bell, Nevada Bell, and SWBT Withdraw Comparably Efficient Interconnection Plan for Voice Store and Forward Services*, DA 99-291 (rel. Feb. 8, 1999); Public Notice, *Ameritech Withdraws Comparably Efficient Interconnection Plan for Personal Access Service*, DA 97-1171 (rel. June 4, 1997).

<sup>16</sup> *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, CCB Pol. 96-09, Order, 11 FCC Rcd. 6919, 6935 (1996).

Internet access service was born.<sup>17</sup> The nascent ISP industry was thus disadvantaged from the beginning by the uncertainty in the ONA/CEI rules.

As the Commission has recognized, lack of finality in competitive rules causes uncertainty in the capital markets and with consumers.<sup>18</sup> This uncertainty damages new entrants while bolstering the position of the incumbent. Moreover, as a practical matter, regulatory uncertainty leaves the Commission paralyzed and the players without a stable framework in which to operate. *Computer III*, with its more than ten-year history of appeals, waivers and amendments, is perhaps the best example of a complete regulatory vacuum. Its failure to open the local bottleneck is therefore unsurprising.

2. The CEI filing process creates a lack of regional uniformity of service offerings.

Even at optimal functioning, ONA/CEI did not provide competing carriers and ISPs with uniform access to network facilities. Because each filing was carrier-specific, the types of plans offered to competitors varied as to each region that the carrier controlled. Indeed, one of the early complaints about the Commission's ONA regime was that "a 'wide variation in the offerings available from region to region'" prevailed despite the numerous ONA plans on file.<sup>19</sup> Despite evidence that only 32% of the BOCs' network component ("NC") offerings were uniformly available across the country, the Commission declined to impose a common set of NCs that every BOC was required to provide.<sup>20</sup>

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<sup>17</sup> One of the first CEI plans filed after enactment of the 1996 Act was Bell Atlantic's CEI plan for Internet Access Services. *See id.*

<sup>18</sup> "Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, 15,557 (1996).

<sup>19</sup> *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2 Phase I, 5 FCC Rcd. 3103, 3111 (1990) (*quoting* Comments of Telenet at 33).

<sup>20</sup> *Id.*

Lack of national uniformity in network provisioning effectively gates the services that competitors may provide. In 1990, faced with almost 500 separate ONA plans,<sup>21</sup> competitors were forced to choose between establishing different modes of interconnection for each region or foregoing the opportunity to serve customers in multiple regions. Few new entrants to any industry have the capital to attain interoperability with more than one system; single-region deployment was thus the answer for many enhanced services providers. This result only favored the incumbent, which itself was barred from providing enhanced services on a nationwide basis.

The competitive situation today is much worse than that of 1990. CEI is wholly useless in today's quest for high bandwidth, the *sine qua non* of effective telecommunications competition. ISPs cannot rely on CEI to obtain most high-capacity loops, because ILEC Digital Subscriber Loop ("DSL") offerings, considered advanced telecommunications, not enhanced services,<sup>22</sup> are available to ISPs only as a finished telecommunications service for resale. Thus, for the purposes of the nation's ISPs, CEI was an unlikely source for obtaining dial-up network components and is now of absolutely no use for serving customers' bandwidth demands.

3. CEI permits ILECs to dictate and limit the types of enhanced services that competitors may provide.

The *Computer III* filing requirements give incumbents the power to dictate the types of enhanced services that are introduced to the market. The peculiarities of the nine-point review checklist for CEI plans<sup>23</sup> permitted, even required, incumbent filers to be very circumspect in their offerings of unbundled elements. Although each plan was required to "give ESPs equal and

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<sup>21</sup> See *id.*

<sup>22</sup> *GTE Telephone Operating Cos., Tariff Transmittal No. 1148*, CC Docket No. 98-79 (rel. Oct. 20, 1998), *recon.* FCC 99-41 (rel. Feb. 20, 1999); *Bell Atlantic Telephone Cos., Bell Atlantic Tariff No. 1, Bell Atlantic Transmittal No. 1076*, CC Docket Nos. 98-168 *et al.*, FCC 98-317 (rel. Nov. 30, 1998).

<sup>23</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229 Phase I, 104 FCC.2d 958, 1039-1043 (1986) ("*Phase I Order*").

efficient access to those basic services that AT&T<sup>24</sup> and the BOCs use to provide their own enhanced services,”<sup>25</sup> in fact that access was required to be offered only to providers of the same service that the BOC sought to offer. Further, the “basic services” that the BOC made available were in fact combinations of elements and functionalities unique to the specific enhanced service,<sup>26</sup> preventing carriers from obtaining the individual network elements themselves. Indeed, the Commission rejected arguments that more granular unbundling, so-called “fundamental unbundling,” could be required.<sup>27</sup> Finally, the Commission’s CEI rules require only that the incumbent’s CEI plan provide the unbundled functionalities that have been previously specifically requested by a competitor. Once the plan is approved, the plan’s unbundled offering is a ceiling, and not a floor, for the incumbent’s obligations.<sup>28</sup> These constraints have the effect of limiting competitors, those carriers actually eligible to obtain CEI elements, to providing exactly the services offered by the BOC in exactly the same manner. CEI therefore has operated as little more than a resale scheme.

The Commission’s theories of competition have evolved significantly since the inception of CEI; its *Computer III* rules have not. Increasingly, the Commission recognizes that true competition can occur only when the local network is opened in a way that allows innovation in services and service deployment.<sup>29</sup> CEI has never achieved, and could never conform to, this objective.

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<sup>24</sup> The Commission repealed most of AT&T’s CEI obligations in 1987 but continues to impose certain CPNI and network disclosure rules. See *Computer III FNPRM* n.5.

<sup>25</sup> *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Video Dialtone-Related Enhanced Services*, Order, DA 95-1283 ¶ 9 (rel. June 9, 1995).

<sup>26</sup> *Id.* ¶ 14-16.

<sup>27</sup> *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2 Phase I, 4 FCC Rcd. 1 (1988).

<sup>28</sup> *Id.* ¶ 16. Competitors may use the 120-day ordering process under ONA to request more discrete or different unbundling than the CEI plan permits. *Id.*

<sup>29</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, FCC 99-238 ¶ 23 (rel. Nov. 5, 1999).

4. The Commission's CEI provisioning timeline prevents competitors from offering service until after the ILECs have effectively captured the market

The CEI rules give the incumbent a significant head start in the provision of new enhanced services. In order to obtain approval for a CEI plan, the incumbent must demonstrate that its CEI offering will be available to competitors on the date that the enhanced service is launched to end users.<sup>30</sup> Thus, the date on which the ILEC begins serving customers is the first date on which its competitor can begin ordering the elements that comprise the service. The rules provide no provisioning interval in which the ILEC must provision the elements. In addition, as discussed above, in the likely event that a competitor requests certain elements not included in the approved CEI plan, a 120-day ordering process would begin under the ONA regime.<sup>31</sup> By the time that the competitor obtained the necessary elements, the incumbent was likely to have captured the lion's share of that sector of the enhanced services market.

If anything, the past few years have demonstrated that elements delayed are elements denied in the competitive marketplace. CLECs today are petitioning for national loop provisioning intervals calculated in days, not months.<sup>32</sup> The inherent delays in CEI provisioning are interminable by comparison and could not support meaningful competition.

B. Section 251 Has Neither Replaced *Computer III/III* Nor Achieved the Competitive Goals Envisioned by Congress

The Commission predicted in the *Computer III FNPRM* that Congress's unbundling mandates in Section 251 would provide ISPs even greater competitive opportunities by encouraging facilities-based CLEC entry.<sup>33</sup> Because CLECs may now obtain access to last mile unbundled network elements ("UNEs"), the FCC surmised, "BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of

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<sup>30</sup> *Phase I Order*, 104 FCC.2d at 1041.

<sup>31</sup> *E.g.*, *Bell Atlantic Video Dialtone Order*, DA 95-1283 ¶ 16; *Interim Waiver Order*, 10 FCC Rcd. at 1728.

<sup>32</sup> *E.g.*, CC Docket No. 98-147, ALTS Petition for Declaratory Ruling: Broadband Loops (filed May 10, 2000).

access to basic services.”<sup>34</sup> In addition, the FCC had believed that “incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the presence of [CLEC] competitors.”<sup>35</sup> Fate has not played out the way the Commission had hoped.

As the Commission is all too well aware, the CLEC community has not fared well under Section 251. Untold numbers of voice CLECs have filed bankruptcy and five competitive DSL carriers have ceased operations.<sup>36</sup> According to the Commission’s December 2000 report on local competition, only 6.7% of the nation’s local lines are served by CLECs.<sup>37</sup> This figure represents only a 50% increase since December 1998.<sup>38</sup> Of the 4.3 million high-speed lines counted in the Commission’s December 2000 study, it is unknown how many are controlled by CLECs.<sup>39</sup> These figures demonstrate that the 1996 Act has not been the competitive panacea that the industry expected. More specifically, they demonstrate that ILECs retain the power to gate competitors out of the local telecommunications market.

The ILECs have not treated ISPs appreciably better. Every remaining ILEC, rather than provide Internet access service through an unaffiliated ISP, has established their own ISPs as wholly-owned subsidiaries. Just as in the local telecommunications market, ILECs now have every incentive to prevent competitive ISPs from reaching their customers. As a result, ISPs, even those with whom the ILECs have established a contractual reseller relationship, receive substandard provisioning intervals and customer service from the ILECs.

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<sup>33</sup> *Computer III FNPRM* ¶ 49.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 33.

<sup>36</sup> CC Docket No. 01-9, Comments of Covad Communications (redacted) at 5 (filed Feb. 28, 2001).

<sup>37</sup> Public Notice, *FCC Releases Study on Telephone Trends* (rel. Dec. 21, 2000).

<sup>38</sup> The Commission estimated in December 2000 that CLECs served “less than 3% of nationwide switched access lines.” FCC, *Local Competition*, Common Carrier Bureau Industry Analysis Division (Dec. 1998).

<sup>39</sup> FCC, *Trends in Telephone Service*, Common Carrier Bureau Industry Analysis Division at 2-2 to 2-5 (Dec. 2000).

Underlying these provisioning problems is the 1996 Act's own litigious history. Despite their stated good intentions to comply with the market-opening provisions of the Act,<sup>40</sup> the ILECs have litigated against nearly every FCC rule implementing Section 251.<sup>41</sup> In addition, the inherent ambiguity and lack of clarity in the statute's language has caused both sides to seek judicial interpretation of Congress's mandates. Section 251 has thus been clouded in uncertainty as well, and has caused the competitive industry to expend substantial resources to enforce their rights legally rather than to use them operationally. The resulting picture in 2001 is that the 1996 Act has neither guaranteed an open network nor obviated the need for ISPs to obtain network access in their own right.

C. Providing "Extended" ONA Unbundling to ISPs Would Be of Uncertain Legal Validity and Is Unlikely to Resolve The Local Bottleneck

The Commission's proposal to extend "Section 251-type" unbundling rights to ISPs,<sup>42</sup> attractive though it was in 1998,<sup>43</sup> is not a workable solution for today's market. As an initial matter, the Commission would encounter myriad jurisdictional and statutory challenges to such an action. Section 251, though enacted and implemented at the federal level, remains essentially a state matter for purposes of actual UNE provisioning. Adoption of a rule that expands Section 251 to ISPs would likely cause same state commission outcry that led to the jurisdictional challenges in *Iowa Utilities*.<sup>44</sup> Secondly, the plain language of Section 251 makes unbundling available only to telecommunications carriers;<sup>45</sup> to grant the same rights to non-telecommunications carriers like ISPs

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<sup>40</sup> See Ameritech Comments at 5 (Mar. 27, 1998); BellSouth Comments at 11.

<sup>41</sup> In this vein, BellSouth, SBC and Verizon recently filed a Joint Petition for a Commission ruling that ILECs no longer must unbundle high-capacity loops and dedicated transport under Section 251 (filed Apr. 5, 2001).

<sup>42</sup> *Computer III FNPRM* ¶ 96.

<sup>43</sup> Nine of the 29 initial commenters in this proceeding favored ISP unbundling. Ad Hoc Telecommunications User Committee Comments at 9 (Mar. 27, 1998); Comments of ADT Security Services at 7; Joint Comments of APK Net, Ltd. et al. at 9-15; Comments of CIX at 4-9; Community Internet Systems Comments at 2; Comments of Helicon Online at 3, 7-8; KWOM Communications Comments at 4; Comments of NorthPoint Communications at 3; Comments of WorldCom at 4.

<sup>44</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 743 (8<sup>th</sup> Cir.), *aff'd in part and rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>45</sup> E.g., 47 U.S.C. § 251(c)(3).

would be a considerable stretch of the Commission's authority. Finally, as a matter of policy, treating ISPs as CLECs despite the ISPs' continued (and appropriate) unregulated status would create an unequal playing field for high-speed telecommunications, as a few commenters have already noted.<sup>46</sup>

As a practical matter, the industry's experience under 1996 Act suggests that simply creating an ISP analog for Section 251 would be a futile gesture. It is unlikely that any but a few ISPs could survive what dozens of well-capitalized CLECs could not. Moreover, to grant ISPs unbundled access to the network more than five years after the fact would be a pyrrhic victory for Internet access indeed. Finally, efforts within Congress to repeal much of Section 251<sup>47</sup> could leave the Commission at a loss for an unbundling analog.

## II. THE COMMISSION SHOULD REVISIT ITS FUNDAMENTAL COMPETITIVE PRINCIPLES TO DEVISE A WORKABLE UNBUNDLING REGIME THAT REMEDIES THE ERRORS OF THE PAST

The Commission's goal in this proceeding is to "strike a reasonable balance between our goal of reducing and eliminating regulatory requirements when appropriate . . . and our recognition that, until full competition is realized, certain safeguards may still be necessary."<sup>48</sup> As the foregoing discussion demonstrates, the market has not yet approached "full competition," requiring that safeguards remain in place. Deregulation cannot be the solution to a failed market, regardless of the Commission's overall mission to minimize its involvement in the establishment of competition.

The Commission today has the opportunity to create a regime in which ISPs can obtain meaningful network access. This effort would require the Commission to start anew, drawing on the lessons that *Computer III* and the 1996 Act have provided. The Commission's understanding of

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<sup>46</sup> E.g., NorthPoint Comments at 3 (Mar. 27, 1998); AOL Comments at 15-16; MCI Comments at 70-71.

<sup>47</sup> Chairman Tauzin of the House Commerce Committee is expected to introduce another broadband bill that will relieve unbundling obligations and LATA restrictions for the ILECs. Patrick Ross, "Opponents Chime in on Broadband Bells," CNet News.com (Apr. 9, 2001), available at <[www.news.cnet.com/news/0-1004-200-5548018.html](http://www.news.cnet.com/news/0-1004-200-5548018.html)>.

<sup>48</sup> *Computer III* FNPRM ¶ 7.



the mechanics of competition has reached a new level of sophistication, and it now can apply that understanding to today's circumstances in order to salvage Internet access competition.

Given the present circumstances of the competitive market, no one solution could be a panacea for ISPs. Rather, USISPA proposes a menu of options that together may finally align the proper incentives with appropriate processes to encourage competitive entry and service innovation.

- **Structural Separation**

The Commission has explored the idea of structural separation for advanced services since 1998.<sup>49</sup> Having wisely reserved judgment on separation while the market took shape, the Commission has seen the abuses that result from the ILECs' ability to provide local telephone and DSL service through an integrated entity. The Commission should therefore now adopt mandatory structural separation for Internet access services that comports with the structural mandates in Section 272 of the 1996 Act.<sup>50</sup>

Structural separation would achieve two key objectives in furtherance of local competition: first, it would prevent ILECs from using local telephone and access charge revenues to cross-subsidize high-speed Internet access services; second, it will provide the competitive industry and the Commission with a benchmark for monitoring the ILEC's UNE provisioning.

- **Competitively Neutral Access**

The Commission should ensure that all telecommunications carriers, both data providers and integrated voice-data providers, have access to network elements on an equal basis. As we have learned from the CEI experience, competitors should not be forced to provide specific services in order to obtain specific elements. The Commission's local competition rules have embraced this approach and should continue to do so.

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<sup>49</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 ¶¶ 83-115 (rel. Aug. 7, 1998).

<sup>50</sup> 47 U.S.C. § 272.

- **Section 251 Enforcement**

Despite the flaws that implementation has revealed, Section 251 does provide a framework for provisioning the local network, most importantly the last mile loop, for CLECs. Chairman Powell has stated that his chief objective for Title II shall be enforcement of existing unbundling rules rather than imposition of new obligations. Consistent with this commitment, the Commission should assert its clear authority under the Act<sup>51</sup> to investigate and sanction violations of its collocation, loop unbundling and line sharing rules to prevent further network stalemate.

Absent affirmative Commission action, including *sua sponte* investigation, Section 251 may become an empty fiat as is *Computer III*. The Commission has amassed an impressive bevy of procompetitive rules to implement Congress's mandates. Yet the competitive industry suffers every day from the ILECs' refusal to comply with those rules. At this critical point in the life of competition, the Commission must attack the task of enforcement with the same vigor with which it created line sharing, cageless collocation and spectrum management. Only the Commission's authority can achieve Section 251 compliance.

- **Federalize Broadband Provisioning Rules**

In order to create uniform application of its unbundling rules, the Commission should assert jurisdiction over ILEC provisioning of broadband-related network components. Having already declared, for example, that DSL service is jurisdictionally interstate,<sup>52</sup> the Commission should reify this concept by adopting federal mandates for DSL loop provisioning. According to the clear language of Section 706, the Commission may invoke any of Congress's procompetitive measures in

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<sup>51</sup> "[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." 47 U.S.C. § 208(a). "The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made[.]" 47 U.S.C. § 403.


<sup>52</sup> See *supra* note 22.

the 1996 Act to achieve ubiquitous broadband access.<sup>53</sup> By invoking its Section 706 authority to federalize broadband network elements, the Commission would simply reapply its historical application of *Computer III* rules as a federal matter, and would help to achieve the national uniformity that ONA/CEI decidedly were lacking.

### CONCLUSION

For all these reasons, USISPA recommends that the Commission decline to rely upon the *Computer III* ONA/CEI model for attaining competitive network access, and instead adopt a new model of unbundling providing the correct incentives and enforcement to ensure that the local network finally be open to true competition.

Respectfully submitted,

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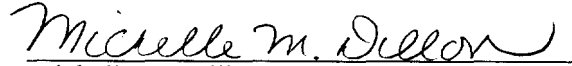
Dated: April 16, 2001

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<sup>53</sup> See 1996 Act, § 706.

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I hereby certify that on this 16<sup>th</sup> day of April, 2001, that a copy of the foregoing document was served by messenger (\*) or by first class mail, postage prepaid to the following parties:

  
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